SUPREME COURT, U. S.

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-120

FINIS P. ERNEST, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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To the United States Court of Appeals for the Seventh Circuit

Finis P. Ernest, a corporation, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 29, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on Pages A-1 through A-13. The opinion of the Court

of Appeals affirmed the convictions of Finis P. Ernest, Inc. and a co-defendant corporation for an alleged violation of Section 1 of the Sherman Act (15 USCA Sec. 1). The petitioner and co-defendant had been tried by jury in the United States District Court for the Eastern District of Illinois, the Honorable James L. Foreman, Judge presiding, and the jury found both defendants guilty. The Court denied all defendant's post-trial motions, imposed monetary fines upon both defendants and entered judgment of conviction on the jury's verdict.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 29, 1975. A petition for re-hearing was filed on February 15, 1975, and denied by the United States Court of Appeals on February 25, 1975. This defendant was uninformed of the denial of the Petition for Re-hearing until on or about the 12th day of June, 1975, as will be more fully shown by the Affidavit of the Clerk from the Seventh Circuit Court of Appeals set forth in Appendix. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Did the court below err in affirming the District Court's judgment of conviction of petitioner by holding that the jurisdictional and substantive requirement of Section 1 of the Sherman Act (15 USCA Sec. 1) of a "restraint of interstate commerce" by the prohibited activity was met by evidence that goods (representing less than 10% of the entire cost of a wholly intrastate local city sewer project) were purchased in interstate commerce and employed in the local construction project and some federal funds for the project came from the United States Department

of Housing and Urban Development (HUD), a federal agency, in the absence of any proof of any restraining effect upon either the price or intent to affect the price of the flow of the incidentally employed interstate commodities.

STATUTES INVOLVED

The statute involved is the Sherman Antitrust Act, 15 USC, Sec. 1, et seq. The relevant provisions of 15 USCA, Sec. 1 are quoted in full as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or be-

tween retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on * * *

STATEMENT OF THE CASE

Petitioner and a co-defendant, Modern Asphalt Paving and Construction Company, were found guilty of an alleged combination and conspiracy to submit collusive bids to the City of East St. Louis, Illinois, for the construction of a sanitary sewer. The Court fined the petitioner $35,000.00 and the co-defendant $15,000.00. The co-defendants were the only bidders for a local sanitary sewer project in the City of East St. Louis on August 6, 1971. The job was awarded to the petitioner on its low bid of $260,180.78. As requested by the City, the defendants submitted individual prices for 16 line items covering different phases of the project. On June 30, 1971, the petitioner was the only bidder on the same sewer project, their bid being rejected by the City because it exceeded engineers cost estimate. The petitioner's bid remained on file with the City of East St. Louis as a matter of public record. The sanitary sewer job was re-advertised and bids were received on August 6, 1971, and it was as a result of this letting that the defendants were charged. The project was financed in whole or in part by federal funds under a grant from the United States Department of Housing and Urban Development, a Federal agency. The bid, as submitted by petitioner in August, was exactly the same as he had previously submitted other than an increase in bid price from $16.03 to $18.03 for 8 inch sewer pipe and an increase in the unit price of infiltration test from $2.00 to $3.00. The net result of which was to increase his bid price from June to August in the sum of $6,240.00.

Clay sewer pipe used in the project was manufactured in Indiana, manhole frames and covers were manufactured in Wisconsin. These items were purchased from the Sidener Supply Company of Granite City, Illinois, out of stock; not ordered by Sidener Supply Company for this project, and were sold to the petitioner at the same price as they would be sold to any other purchaser for any other job. The Government introduced evidence that a sewer pumping station was purchased by the petitioner after the award of the contract from Dabco Manufacturing Company in Georgia. The Government witness testified that the price charged for the pumping station was precisely the same price that would have been charged to any customer. The Government's exhibits further showed that the petitioner's price to the City of East St. Louis for installation of the pumping station in its bid of June, 1971, when there was no charge of a conspiracy or price fixing, was exactly the same as submitted in the bid of August, 1971, resulting in this indictment. Aside from the fact that the pumping station in place, as bid by the petitioner in August, was the same price as bid the previous June, it represented less than 4 per cent of the contract price of the sewer project.

The issue of lack of jurisdiction in the Federal Court was raised by the petitioner and its co-defendant at all stages of the proceedings. The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the conviction of the petitioner amid admissions in said Opinion that other Courts had found jurisdiction absent where there was no showing that the restraint operated on interstate commerce, and it is particularly shown on Page 6 of their Opinion, where they said,

> "The Supreme Court has never decided the question of whether a business with out-of-state activities, which engages in a local conspiracy to restrain commerce, falls within the jurisdiction of the Sherman Act even though there is no restraining effect on interstate commerce."

In addition, the Court of Appeals held, for the first time in any case under the Sherman Act, that the presence of federal money in a project, however local in nature, is sufficient to establish a restraint on interstate commerce within the meaning of the Sherman Act.

REASONS FOR GRANTING THE WRIT

The petitioner, Finis P. Ernest, Inc., respectfully and most earnestly and sincerely urges that there exist in this cause not less than two manifestly, overwhelming and compelling reasons for the granting of a writ of certiorari in this cause. Those reasons are as follows:

1. This Court has never decided the question of whether a local business which only incidentally utilizes interstate goods in its business falls within the jurisdiction of the Sherman Act by engaging in a wholly local conspiracy even though there is no restraining effect on interstate commerce.

2. Neither this Court nor any subordinate Court of Appeals or any District Court of the United States has ever held, as was done by the lower court here, that the fact that a grant of federal funds to finance, in whole or in part, a wholly local intrastate project is sufficient to satisfy the necessary jurisdictional prerequisite of the Sherman Act (15 USCA Sec. 1) of a "restraint of trade or commerce among the several states or with foreign nations."

I

This Court Has Never Decided the Question of Whether a Local Business Which Only Incidentally Utilizes Interstate Goods in Its Business Falls Within the Jurisdiction of the Sherman Act by Engaging in a Wholly Local Conspiracy to Restrain Intrastate Commerce Even Though There Is No Restraining Effect on Interstate Commerce.

The first question to be decided in this case is whether the alleged conspiracy was intrastate or interstate in character.

Both defendants in this case were local contractors, having no interstate business. If a conspiracy was proved in this case the subject matter of the conspiracy was the submission of a bid by the two defendants to the City of East St. Louis. There was no evidence of any conspiracy between either of the defendants with suppliers of incidental materials coming from outside the State of Illinois and used in the sewer project in East St. Louis, which, incidentally, represented less than 6 per cent of the cost of the project.

The conclusion that there was no interstate involvement was admitted by the Circuit Court of Appeals on Page 6 of its Opinion when it said, "Other Courts have also found jurisdiction absent where interstate activities were alleged where there was no showing that the restraint operated on the interstate commerce."

The incidental flow of supplies in interstate commerce does not in itself transform an essentially intrastate activity into an interstate enterprise.

St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Sup. 1045;

Marston v. Ann Arbor Property Management Association, 302 F. Sup. 1276;

Lieberthal v. North Country Lane, Inc., 332 F. 2d 269;

Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167.

Once it is determined, as it was in the instant case, that there was not interstate restraint, then in order for there to be a Sherman Act violation it must be shown that the restraint directly and substantially effected interstate commerce. On that issue we find the Government's evidence, with regard to the incidental items that moved in commerce to be as follows: clay sewer pipe, manufactured in Indiana, and manhole frames and covers, manufactured in Wisconsin, were purchased by petitioner, after the job had been awarded, from Sidener Supply Company of

Granite City, Illinois, who sold the goods to Ernest out of stock on hand in their warehouse in Illinois. A sewer pumping station was purchased by petitioner, after the award of the job, from Dabco Manufacturing Company in Georgia. The total cost of all items from outside the state of Illinois, which were employed in the $260,180.78 project, was approximately $9,307.00. This represented less than 6 per cent of the total contract price. Larry E. Sidener, the owner of Sidener Supply Company, testified that prior to any bidding on this project, he purchased these manhole covers and frames outside the State of Illinois, and had maintained them in his warehouse stock in Granite City, Illinois, for sale to Illinois customers. Daniel Beck of Davco Manufacturing Company testified that the price they charged for the pumping station was precisely the same price that would have been charged to any prospective customer. There was no evidence at all of any effect upon the price charged for the interstate goods which represented the minor faction (less than 6 per cent) of the $260,180.78 cost of the project, and there was no evidence whatsoever of any agreement by Davco, Sidener and the defendants or any one else, to affect or control or restrain the price for deliveries of any commodities in interstate commerce.

In regard to what effect the alleged conspiracy had on the bid submitted by the petitioner in August, 1971, to the City of East St. Louis, we turn to the two Government exhibits, namely: the bid submitted by the petitioner in June, when there was no charge of conspiracy, and the bid as submitted in August, when such a charge was made. We find that the bid submitted in August was changed in two very minor respects, causing an increase in bid price as submitted by the petitioner of less than 3 per cent in relation to the figure submitted when no conspiracy was charged. How can there be any conclusion other than, that there was no conspiracy proved, and that the effect, if any there was, is negligible. The only reasonable conclusion is that the petitioner had set his price when he bid in June and

he should not be held to a conspiracy in August for submitting substantially the same price.

Furthermore, the in-place price of the duplex pumping station from Georgia, as submitted in the June bid by the petitioner, was $49,750.00, exactly the same as the petitioner bid in August. It must be obvious that if there was a conspiracy, it had no effect on the in-place cost of the pumping station to the City of East St. Louis.

II

Neither This Court, Nor Any Subordinate Court of Appeals or Any District Court of the United States Has Ever Held, as Was Done by the Lower Court Here That the Fact That a Grant of Federal Funds to Finance, in Whole or in Part, a Wholly Intrastate Project Is Sufficient to Satisfy the Necessary Jurisdictional and Substantive Prerequisite of the Sherman Act (15 USCA, Sec. 1) **of a "Restraint of Trade or Commerce Among the Several States or With Foreign Nations."**

The indictment in this cause (Appendix "B") in describing the local sewer construction project contained an allegation that the Federal Government, through the United States Department of Housing and Urban Development (HUD), financed the construction of the local sanitary sewer project in East St. Louis, Illinois by the approval of $300,000.00 in federal funds for this project. There was no allegation that such funds were a part of interstate commerce or that the presence of such funds constituted the necessary jurisdictional and substantive requirements of the Sherman Act (15 USCA, Sec. 1) of a restraint on interstate commerce by reason of the effect of the alleged price fixing agreement, Section 1 of the Sherman Act does not refer in any way, either directly or indirectly, to the presence of federal money as an element in determining the jurisdictional and substantive requirements of the act with regard to a restraint on interstate commerce.

There is no decision of any court prior to the decision of the United States Court of Appeals for the Seventh Circuit in the instant case which has held or, so far as is known, has even considered this issue. At Page 8 of the opinion of the United States Court of Appeals for the Seventh Circuit, that court held for the first time in the history of jurisprudence that because funds for the local project came from the United States Department of Housing and Urban Development (HUD), a federal agency, that those funds were transferred in interstate commerce and this fact alone was sufficient to supply not only the jurisdictional nexus of interstate commerce itself, but also the substantive requirements of Section 1 of the Sherman Act. The Court of Appeals hypothesized from a record which is completely devoid of any testimony that the United States Department of Housing and Urban Development (HUD) funds were transferred in interstate commerce or the flow of such funds were restrained in any way.

The issue thus presented is not only novel and one of first impression, but also it is one of far reaching implications. Virtually no aspect of human activity in the fifty States of this Union would be beyond the reach of the implications of Section 1 of the Sherman Act if the decision of the United States Court of Appeals for the Seventh Circuit were allowed to stand. Every physician in this country derives a portion of his income through federal money through Medicare; every pharmacist likewise receives money through the same Government Health and Welfare programs; each local groceryman who accepts food stamps would thus be subject to the Sherman Act; every local service station which sells motor fuel on which there is a motor fuel tax imposed would be within the reach of the Act, however isolated, local and whatever the minor nature of his business activities. No political subdivision of State Government, nor even the State itself, from every local volunteer fire department through each school district, township, city, county and state where any quantity of federal funds

by way of excise taxes, revenue sharing, housing and urban development program, school aid or Medicare. No human activity in our society would be beyond the reach of the Sherman Act if the novel and unprecedented hypothesis set forth in the opinion of the United States Court of Appeals for the Seventh Circuit were allowed to stand. To say that this theory is revolutionary and the implications of it unprecedented is conservative indeed. Neither the legislative history of the act itself nor any decision by this or any other Court which has construed it has ever, by even the slightest hint, suggested that Section 1 of the Sherman Act was intended to have such broad or far reaching implications. It is significant that neither the United States Court of Appeals nor the Federal Government in its Brief filed before that Court cited any legislative or judicial authority in support of its position on this issue.

Almost one-half a century ago, this Court in its infinite wisdom and with an abundance of foresight, cautioned the courts of this nation to be wary of progressive and pernicious extensions of jurisdiction invoked under the Sherman Act by carefully and assiduously considering each case upon the particular facts disclosed by the record. In *Maple Flooring Manufacturers' Assn., et al. v. United States*, 268 US 563, 579 (1925), 69 L.Ed. 1100, this court was called upon to consider whether the conduct of the defendant caused direct and undue restraint of competition in interstate commerce. With regard to consideration of that issue, the Court cautioned at Page 579 of 268 US:

> "It should be said at the outset that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in

the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

CONCLUSION

Certiorari is warranted here. The opinion of the United States Court of Appeals for the Seventh Circuit virtually invites this Court to grant certiorari. Each of the elements which this court has traditionally found to warrant the grant of certiorari is present here:

A. The jurisdictional issue under a law of the United States, to wit: the Sherman Act (15 USCA, Sec. 1) is involved;

B. This court has never decided the issue presented in this cause;

C. The holding of the Court of Appeals that the presence of federal funds in a project or activity is sufficient to comply with the jurisdictional and substantive requirements of the Sherman Act is novel, without precedence, either legislative or judicial, and has such far reaching implications that the issue ought to be decided clearly and unequivocally by no less authority than this Court.

The errors of the Court below should not be permitted to stand.

Respectfully submitted

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 74-1276 and 74-1277

United States of America,
Plaintiff-Appellee,

v.

Finis P. Ernest, Inc. and Modern Asphalt
Paving and Construction Co.,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern
District of Illinois—No. Cr. 73 66 E
James L. Foreman, Judge

Argued November 8, 1974—Decided January 29, 1975

Before MARIS* and HASTINGS, *Senior Circuit Judges*, and TONE, Circuit Judge.

HASTINGS, *Senior Circuit Judge*. Defendants Finis P. Ernest, Inc. (Ernest) and Modern Asphalt Paving and Construction

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* Senior United States Circuit Judge Albert Branson Maris of the Third Circuit is sitting by designation.

Co. (Modern) were indicted under a single count indictment for violation of the Sherman Act, 15 U.S.C. § 1, for a combination and conspiracy to submit collusive, non-competitive and rigged bids to the City of East St. Louis, Illinois, for a city sanitary sewer project. The case was tried to a jury, the Honorable James L. Foreman, Judge, presiding, and the jury found both defendants guilty. The court denied all of defendants' post-trial motions and imposed fines of $35,000 and costs on Ernest and $15,000 and costs on Modern.

Defendants raise three issues in this appeal:

(1) Whether there was sufficient evidence to prove the jurisdictional requirement of a restraint of interstate commerce;

(2) Whether the evidence was sufficient to prove a conspiracy between the defendants to rig bids; and

(3) Whether the court erred in admitting evidence showing that Modern had insufficient funds in its checking account to cover the check which it submitted to the city with its bid.

Jurisdiction

The Sherman Act, 15 U.S.C. § 1, states: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." The Supreme Court has recently reiterated that jurisdictional inquiry under this general language requires a particularized judicial determination which must turn on the circumstances presented in each case. *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 43 U.S.L.W. 4059, 4062 fn. 12 (Dec. 17, 1974). See also *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 526-527 (1972), *cert. denied*, 412 U.S. 950 (1973).

In the instant case, the government introduced evidence that materials used by Ernest in construction of the sanitary sewers were manufactured outside the State of Illinois. Clay sewer pipe manufactured in Indiana and manhole frames and covers manufactured in Wisconsin were purchased from Sidener Supply Company in Illinois. A sewer pumping station was purchased from Davco Manufacturing Company in Georgia. The cost of these items was approximately $9,307. The project was built under contract with the City of East St. Louis with funds supplied by the United States Department of Housing and Urban Development (HUD). In February, 1971 HUD approved $300,000 for public improvements, primarily sewer construction. In October 1971, after the city had had to reject bids for sanitary and storm sewer construction because they substantially exceeded the engineer's estimate, the city requested an additional $300,000 for these projects and the increase was approved by HUD in February 1972. The question is whether these facts and the inferences which may be drawn therefrom satisfy the jurisdictional requirement of the Sherman Act.

In determining whether particular circumstances constitute a "restraint of trade or commerce among the several states" courts have taken differing approaches. See, for example, Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 Fed.B.J. 282 (1965); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L.Rev. 323 (1974). Problems of interpretation seem to be due in large part to the fact that the "single cryptic phrase defines both the conduct prohibited by the Act and the statute's jurisdictional reach." *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 521 (1972), *cert. denied*, 412 U.S. 950 (1973).

Our problem of interpretation is whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that the restraint be upon the interstate commerce. In several recent cases the Court of Appeals

for the Ninth Circuit has viewed the question of jurisdiction under the Sherman Act as entirely one of constitutional power: whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Gough v. Rossmoor Corp.*, 9 Cir., 487 F.2d 373, 376 (1973); *In re Western Liquid Asphalt Cases*, 9 Cir., 487 F.2d 202 (1973), *rev'd in part sub. nom. Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974). *See also Ford Wholesale Co. v. Fibreboard Paper Products Corp.*, 9 Cir., 493 F.2d 1204, *cert. denied*, ... U.S. ..., 43 U.S.L.W. 3212 (1974).[1]

The analysis of *In re Western Liquid Asphalt Cases* is illustrative of this approach. The Ninth Circuit's decision there on the issue of Sherman Act jurisdiction was unaffected by the Supreme Court's decision in the case reported as *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974), since the Court had limited its grant of certiorari to the questions of jurisdiction under the Clayton and Robinson-Patman Acts.[2] In that case the dispute concerned asphaltic concrete which was produced in California and delivered to construction sites in California only. The Court of Appeals held that jurisdiction under the Sherman Act was satisfied because the "production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." 487 F.2d at 204. The court's bifurcated analysis made it unnecessary in deciding the question of jurisdiction to consider whether any interstate commerce was allegedly restrained. This approach,

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[1] See the discussion of Sherman Act jurisdiction in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn.*, 7 Cir., 484 F.2d 751, 755-759 (1973), *cert. denied*, 414 U.S. 1131 (1974).

[2] But see the comment of Mr. Justice Douglas that the Court's holding might result in a different determination of the Sherman Act question on remand. 43 U.S.L.W. at 4066 n.6 (Douglas, J., dissenting).

which widens the reach of the Act, finds some support in decisions of the Supreme Court which emphasize that Congress in the Sherman Act intended to exercise the full extent of its constitutional authority under the Commerce Clause. *See, e.g., Gulf Oil Corp., supra* 43 U.S.L.W. at 4062; *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 557-559 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

In situations such as the instant case, which involve *per se* violations of the Act, there is an additional reason for not requiring proof of an adverse impact on interstate commerce to satisfy the jurisdictional requirement. A *per se* violation is activity, such as price fixing, for which effects need not be shown to establish the substantive offense. Restraints in this category "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Where activity falls within one of these classes of restraints it is "not for the courts to decide whether in an individual case injury had actually occurred" in determining whether there has been a substantive violation of the Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). It may be anomalous to require proof of effects to satisfy jurisdiction in those cases where proof of effects is not necessary to establish the substantive offense. See *P. Areeda, Antitrust Analysis* § 178 (1967).

The alternative approach to Sherman Act jurisdiction which considers the nexus between restraint and interstate commerce is supported by other circuits decisions of the Ninth Circuit, decisions in other circuits, as well as by other language of the Supreme Court.

The jurisdictional analysis in *Page v. Work*, 9 Cir., 290 F.2d 323 (1961), seems inconsistent with the Ninth Circuit's most recent decisions, yet *Page* continues to be cited with approval in those cases. In *Page*, the complaint alleged that the defendants eliminated competition in legal advertising in Los Angeles County. The court noted that the defendant newspapers bought newsprint from outside the state, carried some national news and advertising and had some out-of-state subscribers. The court nevertheless concluded that since the claimed restraints were "on a purely local level and were wholly directed to [the] local intrastate market," 290 F.2d at 330, the jurisdictional requirement of the Sherman Act was not satisfied. The court said, "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." 290 F.2d at 330. In distinguishing a group of other newspaper cases the court said further, "[i]n all the above cases a restraint of interstate commerce was found which was determinative of federal jurisdiction." 290 F.2d at 331. There is no question in *Page* that the locus of the restraint was a consideration in determining jurisdiction. *See also, Sun Valley Disposal Co. v. Silver State Disposal Co.*, 9 Cir., 420 F.2d 341 (1969).

Other courts have also found jurisdiction absent where interstate activities were alleged where there was no showing that the restraint operated on the interstate commerce. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 5 Cir., 469 F.2d 416 (1972); *Lieberthal v. North County Lanes, Inc.*, 2 Cir., 332 F.2d 269 (1964); *Elizabeth Hospital, Inc. v. Richardson*, 8 Cir., 269 F.2d 167, *cert. denied*, 361 U.S. 884 (1959); *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970).

The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of

the Sherman Act even though there is no restraining effect on interstate commerce. In deciding related questions, however, the Court has used language which might suggest that an interstate restraint is required for jurisdiction.

In a landmark case holding that a locally applied restraint came within the purview of the Act if the result was to restrain interstate commerce, the court stated the jurisdictional issue like this: "We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among the states." *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 461 (1949). The Court went on to explain that whether defendants were engaged in interstate commerce was not determinative.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. 336 U.S. at 464.

In its recent decision in *Gulf Oil Corp., supra*, the Supreme Court quoted this language from *Women's Sportswear* and briefly reviewed, in dicta, the jurisdictional requirement of Section 1 of the Sherman Act. The Court said, "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods." 43 U.S.L.W. at 4062. After noting that Section 1 was designed to utilize the full extent of the constitutional power under the commerce clause, the Court went on to state that a local contract, combination or conspiracy "may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce." *id.*

The possibility that an adverse effect upon interstate commerce is a jurisdictional requirement is also suggested by lan-

guage in earlier decisions of the Court. *See, e.g., United States v. Employing Plasterers Association*, 347 U.S. 186, 188 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 238-239 (1948).

Thus, there is substantial support for both responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce. We need not resolve that issue here, however, because we are convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach.

Under the first approach we need only find that the restraint is sufficiently related to commerce that Congress has jurisdiction to act. Here, alleged bid rigging enabled Ernest to obtain the city sewer contract and in performing that contract it used approximately $9,307 worth of materials obtained in interstate commerce. This relationship is sufficient to assure that application of the Sherman Act to this case is not beyond the constitutional authority of Congress. Where a *per se* restraint is involved, the quantity of interstate commerce is unimportant. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956); *United States v. Bensinger Co.*, 8 Cir., 430 F.2d 584, 588 (1970).

If, however, proof of a restraint of interstate commerce is required for jurisdictional purposes, there are sufficient facts to warrant such a finding. Although there was evidence that the price of $9,307 worth of materials was not affected by the alleged bid rigging since the sellers charged their standard prices for the items sold, there is still evidence to support inferences that the defendants' activity had a restraining effect upon interstate commerce.

The restraint potentially reduced competition in materials in interstate commerce. If there had been genuine competitive bidding, each contractor, in an effort to make the lowest bid,

would have obtained competitive prices from materials suppliers. The effect of the restraint was that neither Ernest nor Modern had any incentive to obtain competitive prices from out-of-state suppliers.

Further, where bids are rigged, the price the city will have to pay for the project is artificially increased. The disparity between the bids and the city engineer's lower estimate of the cost of the project is some evidence that the effect of the defendants' activity was to increase the city's cost for the project. Increasing the city's cost restrains interstate commerce in at least two ways. First, funds for the project came from HUD and its appropriation to the city had to be increased after the bid, higher than the engineer's estimate, was received. HUD funds are transferred in interstate commerce. An increase in the amount of money required for this project would inevitably mean that there would be less money available for HUD projects elsewhere in the United States. Second, where the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring use of goods shipped in interstate commerce.

We therefore hold that there was sufficient evidence introduced at trial to satisfy the jurisdictional requirement of the Sherman Act.

Sufficiency of the Evidence

Appellants argue that the evidence at trial was insufficient to prove that defendants conspired to rig bids for the city sewer construction project. It is not for an appellate court to weigh the evidence or determine the credibility of witnesses. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not

be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " *Glasser v. United States*, 315 U.S. 60, 80 (1942). Where the evidence is circumstantial it is not necessary that it be such as to exclude every reasonable hypothesis other than that of guilt. As with direct evidence, it is only necessary that the jury be convinced of guilt beyond a reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954).[3]

Our review of the evidence in the light most favorable to the government indicates that it was sufficient to prove that the defendants conspired to submit collusive bids to the City of East St. Louis.

Bids for the sanitary sewer project were first let on January 30, 1971. Ernest's bid was rejected because it was the only bid submitted for that project and because it substantially exceeded the city engineer's estimate for the cost of the job.

The sanitary sewer job was put up for rebidding on August 6, 1971. This time, only Ernest and Modern submitted bids. Ernest was awarded the contract. The bids were submitted in the form prescribed by the city which called for the listing of sixteen unit prices. Each unit price was to include all labor, materials, overhead, profit, insurance and all other costs required to cover the finished work. Although materials costs might sometimes be standardized, there were no standard prices for unit prices such as these including so many uncertain variables. Nevertheless, in the bid submitted by Modern seven of the sixteen unit prices were identical to those in the Ernest bid. For each of the other nine unit prices, the bid submitted by Modern

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[3] *Cf. United States v. McCarthy*, 7 Cir., 196 F.2d 616, 619 (1952), decided by our court prior to the decision in *Holland*. While other courts of appeals have since rejected, in light of *Holland*, the rule of circumstantial evidence followed in *McCarthy*, our court has not previously had occasion to reconsider the issue. See *United States v. Currier*, 1 Cir., 454 F.2d 835, 838, 838 n.6 (1972).

was slightly higher than Ernest's bid. The differences in the prices on those items suggest that unit prices of the Modern bid had been arrived at by making simple changes in the unit prices from the Ernest bid. For example, Ernest's unit price for the first item, laying eight inch sewer pipe at depths of from six to nine feet, was $12.19, while Modern's bid was $13.19. Modern's bids on seven of the unit prices could have been the result of merely rounding off Ernest's bids for those items. For example, Ernest's bid for item three was $33.42 and Modern's was $33.50. The pumping station price on the Modern bid had been altered on the form from $49,050 to $50,550 so as to suggest that it had been deliberately changed to be higher than the Ernest price of $49,750.

There was other evidence that the Modern bid was not a serious one and was submitted so that there would be an appearance of competitive bidding. Modern's bid had been prepared on the morning the bids were due by one of its employees working at home without anyone's assistance. No one from Modern inspected the work site or contacted any suppliers.

There were also indications that Modern did not believe it could get the sewer job. It had submitted bids on other contracts which, when combined with this contract, would have committed Modern to construction jobs beyond the amount for which it could obtain a performance bond. Further, it did not appear that Modern expected the city to cash its check submitted with its bid because its checking account did not contain sufficient funds to cover the check.[4]

The government also showed that the two companies would have had an opportunity to agree upon a collusive bid because

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[1] Although appellants claim that it was error to admit evidence concerning the checking account, as we discuss *infra*, we find the evidence was properly admitted.

during the summer when the bids were submitted they were working together on a driveway project.

We find that there was substantial evidence to support the jury's verdict.

Admission of Evidence

Finally, appellants argue that it was error to admit testimony of a bank cashier and Modern's bank statements indicating that there were insufficient funds in its checking account to cover the full amount of Modern's bid check. Appellants object to the evidence as irrelevant, improper rebuttal testimony, and impeachment on a collateral matter. The trial court held the evidence admissible and relevant to the question of the seriousness of Modern's bid. We agree.

Appellants contend that the evidence was in the nature of impeachment and collateral to any issue in the case. Impeachment is an attack upon the credibility of a witness. A witness' testimony may be contradicted without being impeached. *United States v. Williamson*, 5 Cir., 424 F.2d 353, 355 (1970). Here, the evidence was admissible for a purpose other than impeachment. Modern had introduced evidence to attempt to establish that its bid for the sewer job was a serious one despite the fact that it had not submitted a certified check as required by the bid specifications. The government in rebuttal introduced the evidence of insufficient funds in an attempt to demonstrate that the check was not indicative of a serious bid. The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party. *United States v. Mallis*, 3 Cir., 467 F.2d 567, 569 (1972); *United States v. Crowe*, 7 Cir., 188 F.2d 209, 213 (1951). There was no abuse of discretion in admitting the evidence in rebuttal.

The convictions appealed from are, in all respects, affirmed.

Affirmed

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the United States District Court
For the Eastern District of Illinois

United States of America,

v.

Finnis P. Ernest, Inc.; and Modern Asphalt Paving and Construction Co.,

Defendants.

Criminal Action No. 73-66-E

Filed: .....

INDICTMENT

The Grand Jury charges:

I

The Defendants

1. The corporations named below are hereby indicted and made defendants herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this indictment, these defendants have engaged in the business of construction in the City of East St. Louis, Illinois.

Corporation	State of Incorporation	Principal Place of Business
Finis P. Ernest, Inc.	Delaware	East St. Louis, Illinois
Modern Asphalt Paving and Construction Co.	Delaware	East St. Louis, Illinois

II

Co-Conspirators

2. Various persons not made defendants in this indictment have participated as co-conspirators in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.

III

Definitions

3. As used herein:

(a) "Sanitary sewers construction" means the installation of sewer pipe, sewage pumping stations, manhole frames, manhole covers, joints, valves and other related material necessary for the transmission of domestic wastes, sewage, waste water and other effluents.

(b) "Urban renewal area" means a slum area, a blighted deteriorated area which the Secretary of the United States Department of Housing and Urban Development has approved as appropriate for an urban renewal project.

(c) "Urban renewal project" means the undertakings and activities of a local urban renewal agency within an urban renewal area for the elimination of the development or spread of slums and blight.

(d) "Project improvements" means the installation and construction of public improvements as part of an urban renewal project within an urban renewal area which are necessary for carrying out the objectives of the urban renewal.

IV

Trade and Commerce

4. In 1959, the Federal Government awarded approximately $1.7 million to the City of East St. Louis, Illinois to finance an urban renewal project within an urban renewal area. This urban renewal project included survey and planning, land acquisition, demolition and site clearance, relocation, project improvements and other activities necessary to develop the urban renewal area.

5. In February 1971, the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") approved $300,000 for the project improvements portion of this urban renewal project. These project improvements consisted primarily of excavation, street and storm sewers construction and sanitary sewers construction.

6. In June 1971, the City of East St. Louis advertised and received bids for these project improvements, including a separate bid for sanitary sewers construction. In June 1971, the City of East St. Louis rejected the bids tendered for these project improvements and re-advertised a second bid invitation for the project improvements. On August 6, 1971, the City of East St. Louis again received bids for these project improvements, including separate bids from the corporate defendants for the sanitary sewers construction. Shortly thereafter in August 1971, the City of East St. Louis awarded the sanitary sewers construction job to the defendant Finis P. Ernest, Inc., on the basis of its low bid.

7. In October 1971, the City of East St. Louis requested an additional $300,000 grant from HUD for said project improvements. In February 1972, HUD approved the City of East St. Louis' request for the $300,000 increase for project improvements.

8. Sanitary sewers construction requires, among other things, the following materials: sewer pipe, manhole frames, manhole covers, and a sewage pumping station. Sewer pipe, sewage pumping stations, manhole frames, manhole covers, and other materials are produced in and/or distributed from states other than Illinois and shipped into the State of Illinois for use in sanitary sewers construction, including such construction performed pursuant to urban renewal project improvement contracts of the City of East St. Louis.

V

Offense Charged

9. Beginning sometime prior thereto, the exact date being unknown to the grand jurors, and continuing thereafter up to at least August 6, 1971, the defendants and co-conspirators have entered into and engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in sanitary sewers construction, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

10. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to submit collusive, non-competitive and rigged bids and price quotations to the City of East St. Louis on August 6, 1971, for sanitary sewers construction in connection with urban renewal project improvements.

11. In furtherance of the aforesaid combination and conspiracy, the defendants and co-conspirators by agreement, understanding, and concert of action did the things which, as hereinbefore charged, they combined and conspired to do.

VI

Effects

12. The combination and conspiracy had the effect of:

(a) Fixing, at an artificially high and non-competitive level, the price of sanitary sewers construction in connection with the urban renewal project improvements contract awarded by the City of East St. Louis in August 1971.

(b) Suppressing and restraining competition in urban renewal sanitary sewers construction in the City of East St. Louis.

(c) Denying the City of East St. Louis the right to receive competitive sealed bids, in free and open competition, for sanitary sewers construction in connection with its urban renewal project improvements.

VII

Jurisdiction and Venue

13. The aforesaid offense was carried out in part within the Eastern District of Illinois within five years preceding the return of this indictment.

MICHAEL L. LEVINSON
Assistant United States Attorney

A True Bill

/s/ JOE D. TURNER
Foreman

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BUDDIA J. RASHID

/s/ ROBERT B. HUMMEL
Attorneys, Department of Justice
HENRY A. SCHWARZ
United States Attorney

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 25, 1975

Before
Hon. John S. Hastings, Sr. Circuit Judge
Hon. Albert B. Maris, Sr. Circuit Judge
Hon. Philip W. Tone, Circuit Judge

Nos. 74-1276, 74-1277.

United States of America, Plaintiff-Appellee, vs. Modern Asphalt Paving and Construction Company, Finis P. Ernest, Inc., Defendants-Appellants.	Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. (73 66 E)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

Petition for Rehearing Denied February 25, 1975.

APPENDIX D

June 10, 1975

Appeal No. 74-1277

United States of America,
Plaintiff-Appellee,

vs.

Finis P. Ernest, Inc.,
Defendant-Appellant.

AFFIDAVIT

I, Thomas F. Strubbe, being duly sworn under oath, depose and state as follows:

1) I am the Clerk of the United States Court of Appeals for the Seventh Circuit, located at Chicago, Illinois.

2) On April 26, 1974, the appeal of the defendant-appellant, Finis P. Ernest, Inc., was docketed in this Court as Appeal No. 74-1277. It was consolidated for oral argument and decision with the appeal of Modern Asphalt Paving and Construction Company, Appeal No. 74-1276.

3) On June 12, 1974, attorney Phillip A. Montalvo filed an appearance in this appeal on behalf of the aforesaid defendant-appellant, Finis P. Ernest, Inc. Briefs were filed and this appeal (together with No. 74-1276) was scheduled for oral argument on November 8, 1974. Notice of such oral argument was sent to all counsel of record on September 18, 1974. No notice was sent to attorney Edward Neville.

4) On November 1, 1974, a motion was filed in this Court to allow the withdrawal of previous counsel for the defendant-appellant. On November 8, 1974, an order was entered allow-

ing attorney Edward Neville to substitute as counsel for the defendant-appellant. No appearance was filed by attorney Edward Neville.

5) The oral argument of this appeal was held on November 8, 1974. On January 29, 1975, the opinion of this Court affirming the decision of the District Court for the Eastern District of Illinois was filed. Judgment was entered accordingly. On February 12, 1975, a petition for rehearing was filed on behalf of the defendant-appellant, Finis P. Ernest, Inc.

6) On February 25, 1975, an order was entered by this Court denying the petition for rehearing for Finis P. Ernest, Inc. The deputy clerk transmitting copies of this order to counsel took the names of the attorneys from the specified location on page 1 of our printed docket sheets. Because of the fact that attorney Edward Neville had not filed an appearance, he was not sent a copy of such order. Attorney Phillip A. Montalvo was. The deputy clerks have never been expected to read through the entire multiple-page docket sheets to ascertain the identity of counsel. It appears this could be a shortcoming in our system, unless we can demand that every attorney representing a client in this Court be required to file a formal appearance.

7) It is my understanding that, because of the foregoing, attorney Edward Neville was unable to file his petition for writ of certiorari in the Supreme Court of the United States in a timely manner. I am furnishing him with this "AFFIDAVIT" to explain the reason he was unable to do so. I can see no reason why Mr. Neville or, especially, his client should be penalized for our failure to transmit to him notice of the denial of his rehearing petition.

/s/ Thomas F. Strubbe
Clerk for the United States Court of
Appeals for the Seventh Circuit

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-120

FINIS P. ERNEST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the price-fixing conspiracy of which it was convicted did not sufficiently affect interstate commerce to constitute a violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1.

Petitioner and a co-defendant, Modern Asphalt Paving and Construction Co. (Modern), were found guilty by a jury on a one-count indictment alleging a combination and conspiracy to submit collusive bids to the City of East St. Louis, Illinois, for the construction of a sanitary sewer project. The court fined Modern $15,000 and petitioner $35,000. The court of appeals affirmed (Pet. App. A-1 to A-13).

The judgment of the court of appeals was entered on January 29, 1975. A petition for rehearing was denied on February 25, 1975. Petitioner's petition for a writ of certiorari was filed on July 10, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court.

Modern filed a timely petition for a writ of certiorari on March 27, 1975, which is presently before the Court. *Modern Asphalt Paving and Construction Co.* v. *United States*, No. 74-1219. Petitioner's contention that the price-fixing conspiracy of which it was convicted did not sufficiently affect interstate commerce to constitute a violation of Section 1 of the Sherman Act has been answered fully in our memorandum in opposition in that case, to which we respectfully refer the Court.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[1]We are furnishing a copy of that memorandum to the petitioner here.